United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

No. 2449.

GENERAL ELECTRIC COMPANY, a Corporation,
Appellant,

against

C. A. BROWER, as Trustee of the Estate of Andrus-Cushing Lighting Fixture Company, a Corporation, Bankrupt,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

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Statement of the Case.

This is an appeal from a final order made by the District Court for the Western District of Washington, Southern Division, on January 12, 1914, determining a controversy between the parties which arose in the matter of the bankruptcy of the Andrus-Cushing Lighting Fixture Company, a corporation. The case is presented upon an agreed statement filed by the parties under Rule 77 of the General Equity Rules promulgated by the Supreme Court, and the facts thereof are as follows:

On July 8, 1912, the Appellant, General Electric Company, entered into a contract with the Andrus Company in which it agreed to consign incandescent lamps manufactured by it to the Andrus Company for sale by that Company on a commission basis (pp. 28-33). The parties entered upon the performance of that contract, lamps were consigned thereunder, and in the following year, on August 14, 1913, the Andrus Company, having gotten into difficulties, was adjudicated a bankrupt. At the time of the adjudication lamps which had been consigned under the contract and had not been sold were in the possession of the Andrus Company as the consignee, and they were subsequently taken by the trustee, who was appointed in the bankruptcy proceedings and who claimed the right to hold them for the benefit of creditors. Thereupon, and on October 8, 1913, the General Electric Company filed a petition in the bankruptcy proceedings claiming title to the lamps (p. 36) and on October 15, 1913, filed objections to the confirmation of a sale thereof by the trustee (pp. 37, 38). The petition and objections came on for hearing before the Referee in bankruptcy, and the trustee then contended that the contract under which the lamps had been consigned contemplated an actual sale to the Andrus Company, and that if the sale was not absolute, it was conditional and void as to creditors, because the contract was not recorded under a certain statute of the State of Washington (p. 43). The statute upon which the trustee relied (Rem. & Bal. Codes and Statutes, Sec. 3670) is as follows:

> "All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's of-

fice of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The Referee sustained the trustee's contention, and by an order made in open Court upon the authority of *In re Graves & Labelle,* a case decided by the District Court a short time before, denied the petition (pp. 38 to 40). The case upon which he relied, however, was subsequently reversed by this Court (*In re Graves* and *Berry Bros.* v. *Snowden,* 209 Fed. 336).

A petition for review was immediately filed, and the case was thereupon certified to Hon. Edward E. Cushman, District Judge, by certificate of the Referee, dated October 18, 1913 (pp. 42 to 47), and on January 12, 1914, the order which affirmed the decision of the Referee, and from which this appeal is taken, was made by the District Court (p. 48).

The contract under consideration was not recorded under the Washington statute, and it follows that if it provided for a conditional sale of lamps to the Andrus Company, or a lease with a conditional right to purchase, the Referee and the Court below were right in denying the Appellant's petition, for the statute would operate to make the sale absolute as to creditors and the trustee would succeed to their rights (Bankruptcy Act, Section 47, clause 2, sub-division a).

If, on the other hand, the contract created an agency for the sale of lamps owned by the General Electric Company, and the Andrus Company had possession as agent or factor only, for the purpose of making sales to the public, then neither its creditors nor the trustee would have any right whatever to the lamps and the trustee should have been ordered to give them up to the General Electric Company as the true owner. As this Court has recently said in *Berry Bros.* v. *Snowdon,* 209 Fed., 336, at p. 340: "While it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a

trustee in bankruptcy is vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the property of the bankrupts and not a lien on the property of third persons."

The controversy, then, is with respect to the title to the lamps and turns on the meaning of the contract under which they were delivered. The contract must speak for itself, and is as follows:

"APPOINTMENT OF AGENT.

"INCANDESCENT LAMPS.

"The General Electric Company, a New York corporation (hereinafter called the 'Manufacturer'), hereby, through the General Manager of its Banner Electric Works, at Youngstown, Ohio, appoints Andrus-Cushing Ltg. Fixt. Co. of Tacoma, Wash., (hereinafter called the 'Agent'), an Agent to sell for it its Banner Incandescent Lamps manufactured under United States Letters Patent, of the types and classes hereinafter specified, upon the terms and subject to the conditions herein set forth, and said Agent hereby accepts the appointment, and agrees to comply with said terms and to perform all conditions hereof.

1. The Agency hereby created shall continue for the period of one year from July 8th, 1912, unless sooner terminated as herein provided.

2. The Manufacturer agrees to maintain in the custody of the Agent, to be disposed of as herein provided, a stock of its Banner Gem (metalized filament), Mazda (Tungston) and Tantalum patented incandescent lamps; all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer until fully accounted for as hereinafter provided. The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer; but its intent is to maintain the stock on an average basis of from 30 to 60 days' supply, as

estimated by the Agent. All lamps shipped hereunder by or on behalf of the Manufacturer either to the Agent or upon his request during the continuance of this Agency, shall be subject to the same terms, conditions and agreements as if shipped to said stock, whether or not so specified. The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored.

3. The agent is hereby authorized (a) to sell to anyone, lamps from said stock in broken package quantities at broken package prices, and in standard package quantities at standard package prices, and (b) to sell lamps from said stock to any purchaser under standard forms of contract made by the Manufacturer and under which the Agent may be given, by the Manufacturer, written authority to deliver lamps at the prices fixed in said contracts, and (c) to sell, at prices on the same basis as those in standard forms of contract, lamps from said stock to any purchaser, not under contract, for the purchaser's immediate use; but sales under this subdivision (c) may be made only on written permission from the Manufacturer first obtained in each instance. All sales shall be made only at such prices and upon such terms as may be established by the Manufacturer; the present prices and terms being contained in the schedules presented herewith, which are subject to change on written notice from the Manufacturer from time to time.

Upon all bills and invoices for lamps sold by the Agent shall appear the words: 'Agent for Banner Incandescent Lamps of General Electric Company.' The Agent has no authority to sell or transfer or in any way dispose of such lamps, except as herein expressly provided, and shall not control, or attempt to control, the prices at which any purchaser shall sell any of such lamps. The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent.

The Agent shall conform to the educational and engineering instructions of the Manufacturer, and shall advise with and instruct prospective purchasers as to the classes and types of lamps best suited to their several requirements in order to secure a maximum illumination for a minimum expenditure, and shall conduct the business hereunder to the satisfaction of the Manufacturer.

4. All of the Agent's books and records relating to his transactions in connection with the sale and distribution of the Manufacturer's lamps shall at all times during business hours be open to the inspection of any duly authorized representative of the Manufacturer.

5. The Agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created. The Agent shall be allowed as compensation for the performance of all obligations hereunder, the difference between the amounts received from the sale of the lamps and their value on the basis of a discount of 29 per cent from list prices as to the time fixed by the Manufacturer. The Manufacturer agrees that if the Agent sells, during the period of this appointment, a quantity of lamps the value of which would entitle him to a higher basis of compensation, as shown in Schedules presented herewith, the Manufacturer will at once credit the Agent with an amount equal to the difference between the compensation he has been receiving and the compensation he then becomes entitled to.

6. The Agent shall render to the Manufacturer not later than the tenth of every month, a report, on forms provided by the Manufacturer, covering his sales of the Manufacturer's lamps during the preceding calendar month.

The Agent shall pay over to the Manufacturer, not later than the tenth of every month, an amount equal to the total sales value of all lamps sold hereunder, less the compensation due the Agent, for which collections have been made by the Agent during the preceding calendar month, and a further amount equal to the total sales value less the compensation due the Agent, on all lamps sold by the Agent to cus-

tomers whose accounts covering such lamps are, on the first of the month, past due, according to the Manufacturer's standard terms of payment.

If reports are forwarded as provided in this clause, and are accompanied by a remittance covering in full the lamps sold by the Agent during the preceding calendar month, whether or not such accounts have been collected, such remittance may be the total sales value of the lamps sold, less the compensation due the Agent, and less 5 per cent of the amount so arrived at, which 5 per cent shall be allowed as an additional compensation for such payment and service.

7. The Agent shall, on or before the 15th day of January and July, make and forward to the Manufacturer, on forms provided by the Manufacturer, a complete itemized report or inventory of all of the Manufacturers' lamps on hand at the close of business on the last day of the preceding calendar month, and shall render a similar report within 15 days after the termination or expiration of this appointment with reference to all such lamps on hand at the date of such expiration or termination. At the time for rendering each such report, the Agent shall pay to the Manufacturer the value of all lamps lost from the aforesaid stock or damaged, on the basis of list prices, less a discount of 29 per cent.

8. The agency hereby created may be terminated by notice in writing to the Agent in the event that the Agent shall be or become insolvent or in the event of a breach by the Agent of any of the terms or conditions of this appointment. The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.

This appointment is hereby signed for the General Electric Company, the Manufacturer, by the General Manager of its Banner Electric Works or

his duly authorized representative located in the sales office of its said works at Youngstown, Ohio.

(Signed) N. L. NORRIS,
General Manager Banner Electric Works.

Accepted:

(Signed) ANDRUS-CUSHING LTG. FIXTURE CO.

F. L. CUSHING, Tr.,
Agent."

It was then stipulated that "in pursuance of said contract and in accordance with its terms, the lamps in controversy in this proceeding were delivered by the General Electric Company through its Banner Electric Works to the Andrus-Cushing Lighting Fixture Company and that the value of said lamps is $600.00", and that "the bankrupt Company paid all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the contract above set out:" (p. 34).

It also appeared that one Ackroyd acted for the General Electric Company in supplying the Andrus Company with lamps from a warehouse in Tacoma, and received a commission for his services, that after the contract was made he became a stockholder and an officer of the Andrus Company, that this was understood by all parties, that when the Andrus Company became financially embarrassed he knew about it, by virtue of his connection with that Company, and that the General Electric Company took no steps to terminate the contract (p. 46).

The stipulation then closes, reserving to the Appellee the right to question the jurisdiction of the Court "to hear and determine this appeal" (p. 48).

Specification of Errors.

The Referee and the Court below erred in holding that the lamps in controversy had been sold, either ab-

solutely or conditionally, to the Andrus Company, and in failing to hold that they were in the possession of that Company as agent or factor only. They also erred in refusing to hold that the General Electric Company was the owner of said lamps, and in refusing to direct that they be returned to that Company.

BRIEF OF THE ARGUMENT.

POINT I.

The case presented for review is a "controversy arising in bankruptcy proceedings" within Section 24-a of the Bankruptcy Act and may therefore be reviewed by appeal.

The Bankruptcy Act, in Section 24-a, provides that controversies in bankruptcy proceedings may be reviewed by appeal, and in Section 24-b provides that proceedings of the Courts of bankruptcy may be reviewed by petition.

The Supreme Court has expressly held that a petition by a third party claiming title to goods in the hands of a trustee is a controversy arising in bankruptcy proceedings, reviewable by appeal under Section 24-a.

> *Hewit* v. *Berlin Machine Works,* 194 U. S., 296;
> *Coder* v. *Arts,* 213 U. S., 223, 233, 234;
> *Matter of Loving,* 224 U. S., 183.

In *Coder* v. *Arts,* the Court said, at pages 233 and 234:

> "It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?

> A reference to the adjudications in this Court may assist in clearing the matter. *Hewit* v. *Berlin Machine Works,* 194 U. S., 296, is an illustration of a controversy arising in bankruptcy proceedings (Section 24a) wherein the appeal is under Section 6 of the act of March 3, 1891. In that case the Berlin Machine Works asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court, speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under Section 6 of the act of March 3, 1891."

The General Electric Company, a third party, filed its independent petition asserting title to the lamps. It "intervened in the bankruptcy proceeding, raising a distinct and separable issue as to the title to property in the possession of the trustee" and it follows that the order denying its petition may be reviewed by appeal.

If the proceeding had not been instituted by a stranger but had been a proceeding by the trustee himself to obtain an adjudication as to title to property not in his possession, it might well have been held a proceeding in bankruptcy and subject to review by petition on the authority of *First National Bank of Chicago* v. *Chicago Title and Trust Co.,* 198 U. S. 280. The distinction between claims by third parties and claims by the trustee is well stated in the case of In re *M'Mahon,* C. C. A., Sixth Circuit, 147 Fed. 684, at page 689, where Judge Lurton said:

> "Between *Hewit* v. *Berlin Machine Works* and *First National Bank of Chicago* v. *Chicago Title and Trust Co.,* there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the *res* is

in *custodia legis* and was appealable under section 24a. In the later case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a 'proceeding in bankruptcy' not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the Court of Appeals under section 24b."

And in *Coder* v. *Arts, supra,* the court said at p. 234:

> "Nor is the decision in *Hewit* v. *Berlin Machine Works* inconsistent with *First National Bank of Chicago* v. *Chicago Title and Trust Co.,* 198 U. S. 280. In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property which the District Court found not to be in the possession of the trustee, notwithstanding the petition of the trustee had averred possession" * * *.

The order which denied the petition to reclaim in the case at bar also confirmed the sale made by the trustee against the petitioner's objections, and this separate proceeding by the trustee himself may well be reviewed on the petition to revise which has been filed under section 24b (Case No. 2375). The question of law however, is precisely the same in both cases.

POINT II.

The contract under consideration was intended to be performed, and was in fact performed, in the State of Washington, and the legal effect thereof must therefore be determined by the law of that State.

The contract itself provided that lamps were to be consigned thereunder to the Andrus Company "of Tacoma, Washington" (p. 29), and in performance of the contract, lamps were, in fact, delivered to the Andrus Company from a warehouse in which they were stored in that City and State (p. 35). The contract, therefore, was not only intended to be performed, but was, in fact, performed in the State of Washington, and it follows that the effect thereof must be determined by the law of that State. As the Supreme Court said in *Andrews* v. *Pond,* 13 Pet., 64, at p. 77:

> "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance."

See also *Pinney* v. *Nelson,* 183 U. S., 144, 151.

POINT III.

Under the law of Washington title to the lamps in controversy is in the appellant.

The case of *Eilers Music House v. Fairbanks, et al.,* decided by the Supreme Court of Washington on July 11,

1914, and reported in the advance sheets of "Washington Decisions" issued under date of July 22, 1914, on page 287, has declared the law of that State upon the issue involved in the case at bar, for it construed a similar contract, determined the effect thereof upon the title to property, and thus laid down a rule of property which will be followed by the Federal Courts. The action was replevin and involved the question of title to a piano which had been consigned for sale. The Court said at pages 287 and 288:

> "The contract which the appellant accepted, and under which the piano in question passed from the possession of the appellant, is, in substance, as follows: Goodman and Helgesen, on May 6, 1912, addressed a letter or order to the appellant, in which they say:
>
> 'We will take from you a consignment at Seattle * * * 100 player pianos of the Marshall & Wendall make * * * at the agreed price of $360. f.o.b. Seattle, including player piano bench with each player, *which we agree to sell* at not less than your stock price of $650 without having your written consent so to do * * *. We agree to order and sell exclusively for you * * *. We will keep all goods in our hands fully insured and have policies in case of loss made payable to you and deposit such policies with you. We will pay all taxes levied on such goods as you may consign to us while the same are in our hands or possession. Our consignment account shall at no time exceed $8,000. Instruments consigned to us shall be subject to your order after 90 days from date of shipment to us, and we also agree to pay you in cash on the first of each month interest at the rate of six per cent per annum on the billing price of all goods and instruments remaining on our hands longer than ninety days from date of shipment. We will endeavor to sell all instruments consigned to us within sixty days from the date of shipment to us, and will promptly remit to you cash or approved customers' contract notes which will always be subject to your approval with security on the instruments sold * * *. For the purpose of

> forming the basis upon which our compensation is to be fixed for the sale of such instruments and attending to collections or whatever else you may call upon us to do, instruments are to be invoiced to us as agents, at prices as above stated, and we agree that our compensation and commission hereunder shall be such sum or sums as we may sell said instruments for in excess of such billing * * *. We will send you a report on the first day of each and every month of all instruments remaining unsold and make prompt returns as soon as sales are made.'
>
> The whole tenor of the instrument shows that the goods were to be consigned for sale upon commission, and that there was no conditional sale, because the contract does not create the relation of vendor and vendee.'',

and said further, at p. 290:

> ''The contention of respondent that the contract in question is a conditional sale within the meaning of Rem. & Bal. Code, Section 3670 (P. C. 349, Section 35), as construed in *Eisenberg* v. *Nichols,* 22 Wash. 70, 60 Pac. 124, 79 Am. St. 917, is not sound. The statute is that 'all conditional sales of personal property or leases thereof containing a conditional right to purchase' etc., where the property is placed in the possession of the vendee, shall, unless a memorandum of the sale is filed for record, be absolute as to the classes therein named. The contract under review is not a contract for a conditional right to purchase, but is a mere consignment of goods by a principal to a factor to be sold upon commission.''

The rule that in determining the law of a State the decisions of the State Courts will be followed, when they are such as to establish a rule of property, is well illustrated in the case of *L. C. Smith & Bro. Typewriter Co.* v. *Alleman,* 199 Fed., 1, which was an appeal from the District Court for the Eastern District of Pennsylvania and involved the question whether a certain contract was a bailment or a conditional sale. The case came on before Circuit Judge Gray and District Judges Bradford and

Witmer. The opinion of the Court was written by Judge Witmer and it appears therefrom that both he and Judge Gray were satisfied that the contract was a bailment in the light of common law principles, as well as the Pennsylvania State cases that were cited. Judge Bradford, however, was apparently of a different opinion, for while he joined in the judgment, he did so on the sole ground that the State cases should be followed, saying at p. 6:

> "I am constrained to join in the judgment of reversal solely for the reason that, the decisions of the Supreme Court of Pennsylvania having established a rule of property in force in that state on the subject of conditional sales and bailments of personal property, the federal courts are under obligation to enforce it there without regard to its soundness or unsoundness."

The rule has also been recognized in this class of cases by the Court of Appeals in the Seventh Circuit, in the case of *In re Galt,* 120 Fed., 64. That was an appeal from the District Court for the Northern District of Illinois, and the court, among other questions, considered whether a *bona fide* purchaser or an execution creditor of a conditional vendee was protected against a claim of the vendor, and said at p. 67:

> "The law of the State of Illinois with respect to conditional sales, as expounded by its supreme court, runs counter to the great weight of authority, but has become a rule of property in that state, and we are bound to observe it."

While it is clear that the case at bar must be determined in the light of the law of Washington, and while the law of that state has been settled by its Supreme Court, there is nevertheless no conflict between the views of that Court and those of other courts throughout the country, as will appear from the authorities discussed in the following point, in which the case is argued on the merits.

POINT IV.

The law of Washington with respect to title to the lamps in controversy is right on principle and is in accord with the authorities in other jurisdictions.

In the absence of a controlling decision in the State of Washington the issues involved would be determined in the light of the principles of the common law with respect to sales and bailments, and the authorities in other jurisdictions, interpreting those principles, would be considered. The same result would be reached, for the Washington case is right, and is in accord with other cases on the subject throughout the country, both State and Federal. That a factor or commission merchant to whom goods of another have been consigned for sale is nothing more than an agent to sell, and has no title to the goods themselves, has never been questioned anywhere. There was some question at one time, however, whether such a transaction was a bailment in view of the old definition of a bailment as the delivery of a thing to be returned, but that definition was criticised by Judge Story and other authorities as too narrow, in that it would not include factors, and it is now universally agreed that such a transaction is a bailment, and that a factor is a bailee. A contract under which goods are consigned for sale, then, may be described as an agency contract, a factorage contract, or as a contract of bailment, and these different legal descriptions of the same thing are used interchangeably by the Courts, as well as in this brief.

We are unable to conceive a legal theory upon which it can be argued that the lamps in controversy were sold to the consignee and do not know the theory or points upon which the appellee will rely. It seems clear, however, that his argument must take one of two courses: It must contend that the contract in question, by its

very terms, created the relation of vendor and vendee and resulted in a sale, or, that while the contract itself created an agency for sale only, there were nevertheless facts outside the contract which showed it to be a mere cover, that the real intention of the parties was to pass title and that the so-called agent or consignee was really a vendee. We propose now to consider these two possible lines of argument. If either one of them is sustained the appellee must win. If they both fail; if the contract really creates an agency for sale and there are no facts outside thereof which show any change whatever in the relation thereby created, the appellant must win.

A. THE CONTRACT CREATES AN AGENCY FOR SALE.

The question whether a contract is really one for the consignment of goods for sale by the consignee to the public generally, or is a contract for the sale of goods to the consignee, has been many times before the courts and the principles in the light of which a particular case must be determined, are well settled.

There is no doubt as to what constitutes a sale. Its essential elements are everywhere the same, and the only question in a given case is whether these elements really exist.

In the case of *In re Allen,* 183 Fed., 172, the Court said, at p. 174:

> "A 'contract of sale' is when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price."

In the case of *In re Columbus Buggy Co.,* C. C. A., Eighth Circuit, 143 Fed., 859, Judge Sanborn said, at p. 860:

> "An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale,"

and in defining a conditional sale the same Court said:

> "A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent."

A consignment of goods for sale, however, is something very different and involves no change of ownership whatever. It contemplates a sale in the future, to be made by the consignee, but is not a sale to the consignee. Title remains in the consignor, and the right of the consignee to sell and pass title to a third party is conferred by the consignor as owner and does not exist by virtue of any title in the consignee.

In I, *Mechem on Sales,* it is said in Section 43:

> "Sale, further, is to be distinguished from the creation of an agency to sell. The essence of sale is, as has been seen, the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods, and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent.
>
> Agencies to sell are very common; the most familiar types of such agents being the factor or commission merchant, and the general dealer who receives

> goods for sale under what is usually termed a 'consignment.' In the ordinary cases of this nature, the title to the goods remains in the consignor or principal until sale, and the factor or consignee does not become liable as a purchaser except, according to the weight of authority, when he has sold under a *del credere* commission."

The distinction between a contract of sale and an agency or factorage contract is thus perfectly clear.

The General Electric Company might well have agreed to sell its lamps to the Andrus Company and create the relation of vendor and vendee, and it might equally well have agreed to place its lamps in the hands of that Company to sell and create the relation of principal and agent. Either agreement would have been perfectly lawful and the question is, which relation did the parties intend to create? Their intention must be found in the contract and must be determined in the light of the whole instrument. As was said by the Court in *Franklin* v. *Stoughton Wagon Co.*, C. C. A., Eighth Circuit, 168 Fed. 857, at p. 862:

> "The contract must be read in its entirety, and its construction is not to be gathered from any separate provision of it. It is from the whole contract that the intention of the parties is to be gathered."

Each provision of the contract must be considered in the light of all other provisions, and the application of this test in the case at bar will show that the General Electric Company never parted with its title to the lamps and that the Andrus Company held them as agent or factor only.

The contract is entitled "Appointment of Agent" and in the first paragraph the Andrus Company is appointed "Agent to sell" in accordance with the terms of the contract, and the agent "accepts the appointment" and agrees to the terms (p. 29).

In the paragraph which follows, marked "1," it is provided that the agency shall continue for a year, unless otherwise terminated, and in paragraph "2" it is agreed that the General Electric Company, as the Manufacturer or principal, will maintain a stock of lamps "in the custody of the Agent," that "The quantity of lamps and the length of time they shall remain in stock is to be at all times determined by the Manufacturer," that "all of the lamps in such consigned stock shall be and remain the property of the Manufacturer until the lamps are sold, and the proceeds of all lamps sold shall be held for the benefit and for the account of the Manufacturer," (p. 29), and that "The Agent shall return to the Manufacturer, at any time when directed by it, all or any part of the said lamps that have not been sold, and any duly authorized representative of the Manufacturer shall have access at all times during business hours to the place or places in which said lamps are stored."

In paragraph marked "3" the agent is authorized to sell at prices and on terms fixed by the manufacturer and at such prices and on such terms only. On all bills and invoices for lamps sold he is obliged to state that he sells as "Agent." He guarantees that all lamps sold by him will be paid for, agrees to "conform to the educational and engineering instructions of the Manufacturer," to advise prospective purchasers as to the classes and types of lamps that will give them "a maximum illumination for a minimum expenditure" and to "conduct the business hereunder to the satisfaction of the Manufacturer" (pp. 30 and 31).

In paragraph "4" it is provided that the manufacturer may inspect the books and records of the agent, and in paragraph "5" the agent assumes obligations with respect to the lamps consigned, which according to the terms of the stipulation (p. 34) were duly performed by the Andrus Company in paying "all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the

contract,'' and in the same paragraph it is provided that the agent shall receive a certain commission on lamps sold by him ''as compensation for the performance of all obligations hereunder.''

In paragraph ''6'' it is provided that by the tenth of each month the agent must report the sales made during the preceding calendar month, remit the proceeds of all sales, less his compensation, and perform his guarantee of sales by also remitting for lamps sold to customers whose accounts are past due. An additional compensation is provided in case the agent performs his guarantee before the customer's accounts are due.

In paragraph ''7'' it is provided that the agent shall make and return complete inventories twice a year and pay for any lamps lost from the stock or damaged, at the list price less 29 per cent., and the last paragraph, ''8.'', provides that the contract may be terminated if the agent fails to perform on his part or becomes insolvent, and finally, that ''The expiration or termination of this Agency for any reason shall be without prejudice to the rights of the Manufacturer against the Agent, and immediately upon any such expiration or termination the Agent shall deliver to the Manufacturer all lamps consigned hereunder and that remain unsold and shall fully perform all obligations of the Agent that then remain unfulfilled.''

That is the whole contract under the ''terms'' of which the lamps in question were delivered to the Andrus Company. It is perfectly clear and admits of but one construction. The General Electric Company retained title and all the rights of ownership, and the Andrus Company undertook to sell the lamps as directed by the owner, to assume certain obligations commonly assumed by factors, to guarantee sales made to third parties, and thus be a *del credere* factor, and to take its pay by commission, based on the value of lamps sold, and an agency for sale was thus clearly created. As was

said by the Court in *Norton & Co.* v. *Melick,* 97 Iowa, 564, at p. 567:

> "when it is plainly and unequivocally expressed in the writing that it is an agency, and not a sale, and the title does not pass, there is no room for construction, and adjudged cases upon other contracts are of no aid in reaching a correct conclusion."

The question of title is one of intention and is settled by the express provision of the contract that it "shall be and remain" in the General Electric Company, unless, of course, the other provisions are inconsistent, and unless, upon the whole contract, a contrary intention clearly appears. The other provisions, however, are not only in all respects consistent, but most of them show affirmatively that the parties could not have intended to pass title, for the idea of a sale is expressly negatived throughout the whole instrument, and the elements necessary to constitute a sale do not appear at all. There is no inconsistency whatever, and each provision of the contract either shows affirmatively that it was not intended to pass title, or is wholly consistent with the express declaration that title did not pass.

We propose to consider and determine the legal effect of every provision of the contract and will take up, first, those which expressly confirm the agreement that title shall remain in the General Electric Company, and, second, those relating to the obligations assumed by the agent.

I. The provision that title shall remain in the General Electric Company is expressly confirmed by the following further provisions:

It is expressly confirmed by the provision that the proceeds of sales "shall be held for the benefit of the

manufacturer'' for a trust is thus imposed on the proceeds and the beneficial interest of the Andrus Company therein is expressly limited to its commission.

It is also expressly confirmed by the provision under which the Andrus Company was obliged to return any part of the stock on hand at any time and to return ''all lamps'' on hand and not sold immediately upon the expiration and termination of the contract.

In the case of *In re Galt,* C. C. A., Seventh Circuit, 120 Fed., 64, Judge Jenkins said at p. 68:

> ''The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sendor the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?''

In the case of *John Deere Plow Co.* v. *M'David,* C. C. A., Eighth Circuit, 137 Fed., 802, Judge Riner said at p. 810:

> ''The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return.''

In the case of *In re Columbus Buggy Co.,* C. C. A., Eighth Circuit, 143 Fed., 859, Judge Sanborn said at p. 861:

> ''The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.''

In *Eldridge* v. *Benson,* 61 Mass., 483, the Court said, at p. 485:

> "The leading feature of the agreement, which of itself would be quite sufficient to determine its meaning, is the right reserved to the defendant to return such portion of the books, delivered to him under the contract, as might not be disposed of by the agents. Such a stipulation is wholly inconsistent with an absolute sale of the property to the defendant, and clearly indicates the intent of the parties to have been, that the right of property should remain in the claimant. The elementary definition of a sale is the transmutation of property from one man to another; but no such change takes place, when it is agreed between parties that property may be returned to the person from whom it was received."

A bailment is also evidenced by the provisions which give the manufacturer the right of access to the consigned stock, and the right to inspect the agent's books and records with respect to sales made therefrom and which require the agent to state that he sells as agent on all bills and invoices, to conform to all educational and engineering instructions of the manufacturer and to conduct the business of selling the manufacturer's lamps to its satisfaction. When goods are sold, this intimate control is not retained, but when they are delivered to an agent for sale and the principal gets nothing until they are sold by the agent, such control is retained as a matter of course. It is wholly inconsistent with the idea of a sale, and is not only consistent with, but is demanded by, the conditions of a bailment for sale.

The provisions that the manufacturer alone shall determine the quantity of lamps to be consigned, and that lamps may be sold only at prices fixed by the manufacturer and subject to change, are further evidence to the same effect. They set forth a natural and consistent factorage arrangement, and would be, to say the least,

most unusual terms for a contract of sale. If the contract had been to sell the lamps to the Andrus Company, it would have been obliged to purchase whatever quantity the manufacturer chose to deliver during the entire term of the contract and at whatever prices the manufacturer chose to name.

II. The obligations assumed by the Agent are consistent with the agreement that title shall not pass.

(a.) The Agent's guaranty of sales makes him a del credere agent and does not indicate a sale.

The contract provides that "The due payment to the Manufacturer for all sales made hereunder by the Agent shall be and hereby is guaranteed by said Agent". The only effect of this, however, is to make the Andrus Company *a del credere* agent. In I. *Clark & Skyles,* on the Law of Agency, at p. 968, it is said of such an agent: "He is said to sell on a *del credere* commission". The same authority says further on the same page:

> "It may be laid down as a general rule that if a person consigns goods to another under an agreement by which the consignee is to receive them, and sell them at prices fixed by the consignor, and guarantee payment by the purchasers, and account to the consignor periodically for the proceeds, retaining for himself an agreed commission, the transaction is a *del credere* agency, and not a sale by the consignor to the consignee."

In *Cushman* v. *Snow,* 186 Mass., 169, the Court said, at p. 174:

> "In such a case moreover the guaranty does not transform the essential character of the relation, for the principal retains title to the goods until sold, and then to their proceeds at least until paid to the agent."

In *The Commercial National Bank* v. *Heilbronner*, 108 N. Y., 439, the Court said, at p. 443:

> "As factors, Vanuxem, Wharton & Co. had no title to the consigned goods. The consignor, upon a consignment of goods to be sold on commission, does not part with his title by the consignment, but he continues to be the true owner of the consigned property until sold by the consignee, and the rule is the same whether the consignee is a *del credere* factor, or is under advances for the principal, or is simply an agent for sale, assuming no responsibility except that usually appertaining to the position of an agent. (*Baker* v. *N. Y. Nat. Ex. Bank*, 100 N. Y. 31; *Mellich, L J., Ex parte White*, 6 L. R. Ch. App. 403.) But a factor under advances for his principal, or who guarantees the sale, has a lien on the goods and their proceeds for his advances, and an interest in the debts arising upon sales, to protect his guaranty. He is entitled to retain possession of the goods and their proceeds, to protect his lien and to collect and sue the debts in his own name, rights of which the principal cannot deprive him except by reimbursing the advances, or in case of a *del credere* factor, by relieving him from his guaranty. (*Hudson* v. *Granger*, 5 Barn. & Ald., 27; *Story on Agency*, Sections 398, 407, 408, 424.) But such factors are nevertheless agents and cannot deal with the property or proceeds as their own."

In *National Bank* v. *Goodyear*, 90 Ga., 711, an agent for the sale of goods agreed that as soon as any goods were sold he would pay the principal therefor in cash, regardless of whether he had collected from the purchaser. The principal took the notes of the agent in lieu of cash, and the Court, in discussing this feature of the case, said, at p. 730:

> "What was the effect of taking Goodyear's notes for goods which he had sold, and for which, according to the terms of his contract, he ought to have paid in cash out of the proceeds of sale. Did this vary the contract as to goods not sold, or was anything waived as to them by the consignor, the E. & F.

> Co.? We think not. Surely an agent to sell does not become a purchaser of unsold goods by his principal accepting notes for the price of goods which have been sold. . . . There is no suggestion in the evidence that any of the notes taken from Goodyear covered any part of the goods which he had failed to sell. It has never been heard of as law that a principal may not settle with his agent, and take a note in lieu of cash for which the latter is liable, without breaking up the agency so far as business not yet transacted is concerned. Such an adjustment would not convert the agent into a purchaser even as to goods sold by him for and on account of his principal, much less as to those remaining unsold."

The contract also provides that the agent shall account for all lamps sold and shall perform his guarantee. It provides that by the tenth of each month he shall remit all collections made during the preceding calendar month, less his commissions, and also for all lamps sold to customers whose accounts, on the first of the month, were past due, and that if he remits for such accounts before they are past due, he may have an additional commission. These provisions simply provide for the performance of the obligations assumed by the agent, and the only point to be considered in respect to them is that they disclose a perfectly natural and usual method for the adjustment of accounts between a principal and his agent or factor. Nothing whatever is due from the agent until after he has sold to the public. When sales have been made he must remit the proceeds and when the accounts of his customers are "past due" he must perform his guarantee. When lamps have been sold and accounts therefor are outstanding, but not "past due", he may, but is not obliged to, perform his guarantee and earn a larger commission. No obligation or right to pay, however, arises until sales have been made, and the agent is neither required nor permitted to buy for himself.

(b.) The assumption of liability for loss and the payment of certain expenses by the Agent is not inconsistent with the relation and does not change the bailment into a sale.

The contract provides that "the agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expenses incidental thereto and to the accounting and collection of accounts thus created" (p. 31), and it also provides that he shall be liable to the manufacturer for the value of all lamps lost or damaged (p. 33). These are obligations commonly assumed by the consignee in factorage contracts, and while they enlarge the liability imposed by the common law, they are perfectly lawful agreements and if the contract in which they appear is otherwise an agency or factorage contract, they in no way change the relation of the parties.

In *Sturm* v. *Boker,* 150 U. S., 312, the effect of a bailee's assumption of liability for loss was considered, and the Court said, at p. 330:

> "The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

In *Snook* v. *Davis,* 6 Mich., 155, the Court construed a contract in which one Robertson agreed to conduct the business of selling goods for the plaintiff. The contract provided that the goods should "at all times", both during transportation and while in Robertson's possession, "be at the risk of the said Benjamin Robertson". He thus assumed all responsibility for loss or damage to the goods, and the Court said, at p. 165:

> "It is contended that the risk is an incident of ownership, and, therefore, conclusive of the ownership of the goods by Robertson; but, though a usual, it is by no means an inseparable incident—it is only so in the absence of contract to the contrary. It is perfectly competent for a clerk, bailee or any other person dealing in any way with the property of another by contract to take the risk upon himself, as Robertson did in this case."

The same rule applies to the agent's payment of storage, cartage, and other expenses connected with the handling and sale of lamps under the contract, for he is otherwise clearly a factor and the assumption of such obligations is consistent with and does not change that relation.

In the case of *In re Flanders,* C. C. A., Seventh Circuit, 134 Fed., 560, the Court said, at p. 562:

> "The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction. It is quite competent for a bailee by contract to enlarge his common-law liability, without converting the bailment into a sale."

In the case of *In re Columbus Buggy Co.*, C. C. A. Eighth Circuit, 143 Fed. 859, the Court construed a contract in which the Agent undertook to bear the expense of insurance, freight, storage and handling of the consigned goods and it was held that the contract was one of bailment only and did not evidence a conditional sale.

In the case of *In re Reynolds,* 203 Fed., 162, a similar contract was construed, in which it was provided that "Said Agent shall transact all business pertaining to the sale of said wagons, and shall pay all taxes, freight, storage and other expenses on same, and keep the same fully protected from the weather, and in good order, all

at the Agent's own expense", and it was held that the contract was a bailment for sale.

See also the authorities cited under B. *infra*.

The principle that a person may lawfully agree to pay expenses connected with another person's goods without thereby becoming the owner thereof, is well settled, and such agreements are often made by factors whose business it is to hold and deal with the goods of other people.

We have now considered all of the provisions of the contract and the whole case thereon,—the case on the entire contract,—is thus presented. The argument speaks for itself, and it is submitted that on the merits and on principle nothing more and nothing less is established than an agency for the sale of lamps.

B. THERE ARE NO FACTS IN THE RECORD TO INDICATE THAT THE TRUE RELATION OF THE PARTIES WAS NOT THAT EXPRESSED IN THE CONTRACT.

Of course, if the actual facts showed that the goods were really sold, then the contract would be a mere cover and a fraud. As the Supreme Court said in *Ludvigh* v. *American Woolen Co.*, 231 U. S. 522, at p. 528, after construing a written contract and finding that it created an agency for sale:

> "It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, there is nothing in its terms operating to transfer the title to the goods * * * *".

There are no such "other circumstances controlling the situation" in the case at bar. The evidence is very

meager, but what there is is wholly consistent with the lawful purpose disclosed by the contract. It appears that lamps were delivered to the Andrus Company from a warehouse in Tacoma by one Ackroyd, who represented the General Electric Company in making the deliveries and who received a commission for his services. It also appears that, after the contract was made, Ackroyd became a stockholder and an officer of the Andrus Company, that this was understood by all parties, that when the company became financially embarrassed he knew about it by virtue of his connection with that company, and that the General Electric Company took no steps to terminate the contract.

It is difficult to perceive the relevancy of these facts, although the failure of the General Electric Company to terminate the contract, if it may be considered, is most significant of its opinion with respect to title, for it is fair to presume that it would at once cease *selling* to a person unable to pay, while it might well continue to deal with an insolvent factor and give business to him with no risk whatever to itself.

In *M'Cullough* v. *Porter,* 4 Watts & Sargeant, 177, it was held that an agreement to furnish goods to an insolvent to be sold at invoice prices, the insolvent consignee to return the invoice price to the consignor, after sale, and to retain all above that sum for himself and his family, was a bailment, that it was not fraudulent as to the insolvent's creditors and that the consigned goods could not be reached by them.

The only other fact that may be said to be outside the contract itself is that the Andrus Company paid taxes and insurance. The contract itself provided that: "The agent shall pay all expenses in the storage, cartage, transportation, handling and sale of lamps hereunder, and all expense incident thereto and to the accounting and collection of accounts thus created," while the stipulation with respect to what the Andrus Company did states

that: "The bankrupt company paid all expenses in storage taxes, insurance, cartage, transportation, handling and sale of all lamps delivered to it in accordance with the contract above set out."

The expenses of taxes and insurance are of the same nature as those expressly set forth in the agreement, and the payment thereof by the agent in no way changed the character of his holding. The point is covered under A. II.b, *supra*, where similar obligations, assumed in the contract, are considered, and where it is expressly shown that the assumption thereof by the factor does not change the relation or indicate a sale. It is of course true that such obligations are incidents of ownership, but the point is that they may be assumed by a person who is not the owner and that the assumption thereof by such a person does not make him the owner, and when, as in the case at bar, the relation of principal and factor is clearly established, the assumption of such obligations by the factor does not change that relation or make him a vendee. There are many authorities to this effect.

In *John Deere Plow Co.* v. *M'David,* 137 Fed. 802, the consignee agreed: "To pay all taxes, license, rents and all other expenses incidental to the safe keeping and sale of the goods and articles of merchandise and to waive all claims against John Deere Plow Company for such expense," and further "to keep said goods and articles of merchandise insured for their full value, at expense of said second party in the name and for the benefit of John Deere Plow Co., in companies approved by them, and to turn over the policies to them, the said John Deere Plow Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party," and it was held that he was an agent or factor only.

In the case of *In re Galt,* 120 Fed. 65, the consignee agreed: "To receive, store, pay freight, and keep under cover, in good condition and fully insured, at his own ex-

pense, all wagons sent him, until sold or ordered away by the party of the first part, as herein provided; to pay all the taxes on wagons on hand should any assessment be made;" and it was held that he was an agent and not a vendee.

In *Franklin* v. *Stoughton Wagon Co.,* 168 Fed. 857, the consignee agreed: "To pay all taxes, license, rents and all other expenses incidental to the safe keeping and sale of said goods and articles of merchandise, and to waive all claims against Stoughton Wagon Co. for such expense," and further "To keep said goods and said articles of merchandise insured for their full value at the expense of said second party in the name and for the benefit of Stoughton Wagon Co., in companies provided by them, and to turn over the polices to them, the said Stoughton Wagon Co., and in case of any neglect or failure to insure as herein provided, to become personally responsible for any loss or damage that may occur to said goods while in the custody of said second party," and he was held to be an agent or factor only.

The contracts in the following cases contained an agreement by the consignee to pay all insurance and taxes free from any claims therefor against the consignor:

Monitor Mfg. Co. v. *Jones,* 96 Wis. 619;
National Bank of Augusta v. *Goodyear,* 90 Ga. 711;
National Cordage Co. v. *Sims,* 44 Neb. 148;
Milburn Mfg. Co. v. *Peak,* 89 Tex. 209;

and they were held to be true agency or factorage contracts and not contracts of sale.

In disposing of the claim that the contract involved in the American Woolen Company case, *supra,* was a mere cover the Supreme Court said at pp. 528-9:

> "It is said that the Horowitzes selected the goods, whereas under the contract the Woolen Company

> had the right to turn over any it saw fit; but this circumstance may be readily explained for the Horowitzes were familiar with and of course interested in their own trade and more likely than anyone else to make proper selections for it, and from the sale of the goods chosen they were to make their profits.'',

and further on, p. 529:

> ''It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods and it is not shown that any creditor relied upon mismarking or misbranding. And memoranda are in evidence showing the names of certain salesmen thereon, but on these same bills it is stated that the goods were furnished under the agreement already referred to.
>
> Against these considerations are the positive terms of the agreement, found to be free from fraud and fairly entered into, which as we interpret them permitted goods unsold to be returned.'',

and in conclusion, at p. 530:

> ''We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be, a consignment arrangement with the net proceeds of sales to be accounted for to the consignor and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is AFFIRMED.''

It is not only perfectly clear that the record contains no material facts outside of the contract, but it is expressly agreed in the stipulation upon which the case is presented, that ''the lamps in controversy'' were delivered by the General Electric Company to the Andrus Company, ''in pursuance of said contract and in accordance with its terms'' (p. 34).

Further Authorities on the Whole Case.

The following cases in which contracts similar to that involved in the case at bar are construed and some of which have already been referred to for their bearing on particular points are submitted for their bearing upon the whole case:

In *Union Stock-Yards & Transit Co.* v. *Western Land & Cattle Co.*, C. C. A., Seventh Circuit, 59 Fed., 49, the facts were stated by the Court as follows:

> "Hall agreed to transport the cattle to his farm at his own expense, and there feed them, that they might be profitably marketed by the cattle company. He covenanted that they should not deteriorate in flesh or condition. He bound himself to pay, at an agreed valuation, for all losses of the cattle arising from 'death, disease, escape, theft, or any cause whatever.' He was to employ at his own expense a herdsman selected by the cattle company. The pasturage was to extend over a period of some 14 weeks, during which time the cattle company should ship the cattle to market, or sell them in pasturage. Hall was to receive, in full compensation for his services and expenditures, all moneys realized from the sale of the cattle by the cattle company in excess of $36.05 per head, after deducting the expenses of shipment and sale."

It was held that the transaction constituted a bailment for sale, and Judge Jenkins, writing for the Court, said: "There is wanting here an essential element of a sale,—an agreement to pay a price." He also said at p. 53:

> "It is of the essence of a contract of sale that there should be a buyer and a seller; a price to be given and taken; an agreement to pay, and an agreement to receive. 'Sale' is a word of precise legal import. 'It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for

> the thing bought and sold.' *Williamson* v. *Berry,* 8 How. 544. A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure, at times. The difficulty must be solved by the ascertainment of the real intent of the contracting parties, as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. Insurance Co. *v.* Randell, L. R. 3 P. C. 101; Jones, Bailm. (3d Ed.), pp. 64, 102; 2 Kent, Comm., Section 589. If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment. Powder Co. *v.* Burkhardt, 97 U. S., 116; Sturm *v.* Boker, 150 U. S. 312, 14 Sup. Ct. 99. In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price.'',

and in considering the effect of the provision that Hall should be liable for all losses, said:

> "It would be most unfair, however, to judge the contract by a single clause disconnected from the other stipulations contained in it. We must have regard to the entire agreement to determine the meaning of any part of it. It may well comport with a bailment of property that the bailee assumes the character of insurer of the thing bailed while it remains in his possession, and as to those disasters which he, by the exercise of care, could largely guard against, and which would be greatly promoted by his negligence. It is competent for a bailee so to enlarge his responsibility. Sturm *v.* Boker, 150 U. S. 312, 14 Sup. Ct. 99. Such a clause, read in connection with the other stipulations of the contract, may well be held a wise provision, imposing

upon the bailee, in the care of the cattle while in his custody, the liability of an insurer, stimulating the exercise of care for them."

See also *Metropolitan Nat. Bank* v. *Benedict Co.*, C. C. A., Eighth Circuit, 74 Fed., 182.

In the case of *In re Galt,* C. C. A., Seventh Circuit, 120 Fed. 64, the facts, as well as the law, are stated in the opinion of the Court, on pages 67 and 68, as follows:

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered, is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. Sturm *v.* Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Union Stock Yards & Transit Co. *v.* Western Land & Cattle Co., 7 C. C. A. 660, 59 Fed. 49. The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale. The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement express or implied, to pay the purchase price of the thing sold. The test would seem to be—Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money?

Carefully analyzing the agreement in hand, we think it must be held that the contract of the parties was one of bailment, and not of conditional sale. The Mitchell & Lewis Company thereby appoints Galt its agent for the sale of its manufacture in the limited territory stated, and in no other place or places; agrees to furnish the goods to the agent at 40 per cent. discount from list prices; they to be sold by him, and accounted for to the company in cash or notes of the purchaser drawn upon blanks furnished by the company, running not more than six months, with interest, and made payable to the company; their payment being guaranteed by Galt. As an in-

ducement to making sales for cash only, an allowance of 5 per cent. on such sales is allowed by the company. All cash is to be remitted not later than the day following the sale; notes to be transmitted every 30 days. If all sales should be upon time, and the notes returned to the company should aggregate more than the prices of the wagons to be accounted for, the surplus is to be returned to Galt when and in proportion to the amount collected. He agrees to sell all wagons within twelve months from date of shipment, and upon failure so to do, at the option of the company, to (1) pay cash for wagons on hand, at the prices stated; or (2) give his note therefor; or (3) store the wagons subject to the order of the company; the ownership of all wagons furnished to remain in the company until settlement as provided; the money and effects received by Galt in the business of the agency in no case to be appropriated to his private use. Galt agrees to store and keep under cover and in good condition all wagons received; to keep them fully insured at his own expense until sold or ordered away by the company; to pay taxes upon them, if any should be assessed; and he is not to sell or assist in the sale of any other wagons than those manufactured by the company.

Applying to this contract the test stated, it is clear that here was a bailment, and not a conditional sale."

See also *In re Flanders,* C. C. A., Seventh Circuit, 134 Fed., 560.

In *John Deere Plow Co.* v. *M'David,* C. C. A., Eighth Circuit, 137 Fed., 802, the following contract was considered:

"This agreement, made and entered into this 15th day of September, 1903, by and between John Deere Plow Co., of Kansas City, Missouri, incorporated under the laws of the State of Missouri, party of the first part, and Hymes Buggy & Impl. Co., of Springfield, County of Greene, State of Missouri, party of the second part.

"Witnesseth, That said first party, for and in consideration of the stipulations and agreements herein

contained, have this day appointed and by these presents do hereby appoint the second party as their authorized agent at Springfield, Mo., for the sale, on commission, of the consigned goods and articles of merchandise designated hereon or enumerated and described on schedules of said second party, to be attached hereto as hereinafter provided.

"The party of the first part agrees to consign to and upon the written request of the said second party, so long as said party of the first part has the goods in stock to enable it so to do, during the continuance of this contract, the goods and articles of merchandise designated hereon, or on schedules or written requests of said second party hereafter made; said schedules or written requests to set forth the net amount to be received for the goods by the party of the first part after the goods shall have been sold by said party of the second part as such agent, and the place to which to be consigned, and when said written requests or schedules properly signed by said second party are accepted by John Deere Plow Co., they shall be attached and made a part of this contract, reference being made to same on the face thereof, subject to the following conditions, agreements and obligations:

"The party of the second part agrees as follows:

"1st. To receive from the Transportation Companies, and pay all transportation charges on same, the goods and articles of merchandise consigned under terms of this contract.

"2nd. To furnish proper warehouse room for all goods and articles of merchandise consigned under terms of this contract.

"3rd. To pay all Taxes, License, Rents and all other expenses incidental to the safe keeping and sale of the goods and articles of merchandise, and to waive all claims against John Deere Plow Co., for such expense.

"4th. To keep said goods and articles of merchandise insured for their full value, at expense of said second party, in the name and for the benefit of John Deere Plow Co., in Companies approved by them, and to turn over the policies to them, the said John Deere Plow Co., and in case of any neglect or failure to insure as herein provided, to become

personally responsible for any loss or damage that may occur to said goods while in the custody of said second party.

"5th. To keep samples of said goods and articles of merchandise set up in salesrooms suitable for the purpose, and to make all reasonable efforts to sell the same; and not to sell any other makes of like goods and articles of merchandise to the exclusion of those consigned under the terms of this contract.

"6th. To sell the goods and articles of merchandise consigned under this contract for enough more (that) the net amounts to be received therefor by said party of the first part, as above stated, and set opposite said goods in the said written request and schedules attached, to pay all freights, taxes, expenses, charges, compensation and commissions for the handling and selling of said goods as herein provided, and the doing of all things herein provided to be done by the party of the second part; it being mutually understood that the said net amounts set opposite said goods in the attached schedules and written requests, are the net prices at which said goods and articles of merchandise are to be consigned for sale, and are the net amounts, which said second party agrees to account for and deliver to the John Deere Plow Co., for said goods when sold, as per terms of this contract. The full charges, compensation, commission and expenses of said second party for the handling and selling of said goods as herein provided, and the doing of all things herein provided to be done by the party of the second part, to be the difference between said net amounts and the gross amounts received from the sale of said goods.

"7th. To sell all goods and articles of merchandise consigned under this contract, subject to the Manufacturer's regular printed Warranty, and to settle all claims for breakage and defects in accordance therewith. And agrees not to part possession with any of the said goods until full and satisfactory settlement shall have been made for same by purchaser, and will not allow, under any circumstances, any of said goods to be taken away on trial before such settlement is made; and that all proceeds of such sales, whether cash, or notes, shall be kept separate and distinct from said second party's other business.

"8th. The second party further agrees to make out and render to the said first party, on the first day of each month, and oftener if so requested, a full and complete report of all sales, made the month previous, or since the last report made; and to accompany said report with a full settlement in accordance with this contract for all goods so reported sold, said settlement to be made with cash for all sales less 5% discount for all cash, months from date of same and bearing interest at per cent., per annum from . And the second party further agrees that when purchaser's notes are given in settlement for sales made as herein provided, said notes will be on blanks furnished by John Deere Plow Co., and are to be taken only from good, prompt paying purchasers. And the second party further agrees to endorse all such notes given to said first party in the following manner, to wit:

"For value received, I or we hereby guarantee the payment of the within note at maturity or at any time thereafter, and waive demand, protest, notice of protest and non-payment.

"9th. It is further agreed and understood, that the goods and merchandise to be supplied hereunder are to be consigned simply, and that the title to and ownership of all goods and articles of merchandise consigned to said second party under the terms of this contract, and all proceeds of the sale of same, shall remain vested in said first party, and be its sole property and subject to its order, until the full amount to be received for said goods, as herein provided, shall have been received by said party of the first part.

"It is further agreed that this contract is to remain in force unless cancelled and annulled by said first party, until Oct. 1st, 1904, at which time said second party agrees if required by said first party, to return all goods remaining on hand unsold at the expiration of this contract to them at their warehouse in Kansas City, in good order and free of all freights and charges.

"This contract is not transferable and should the second party hereto sell out or otherwise dispose of his business at any time prior to its expiration, the right to declare this contract cancelled and annulled

from and after the date of such sale or transfer is reserved to party of the first part, without prejudice.

"The second party hereby agrees to forward any goods received on this contract at any time, and as said John Deere Plow Co., or their authorized agents may direct, charging only actual cost of freight and drayage, collecting same from transportation company as back charges.

"It is also agreed that the contract held by John Deere Plow Co., is to be considered the original, and to be the binding agreement in case the duplicate varies from it in any particular. And that the same may be terminated at any time at the option of the John Deere Plow Co., and the goods remaining on hand unsold shall be subject to the same terms and conditions as herein provided for.

"It is understood and agreed that, in writing and printing, this paper contains the full and entire agreement between the parties hereto, and that no outside oral or written understanding with any traveling agent of John Deere Plow Co., is of any force or effect whatever." * * *

The Court, by Judge Riner, said at p. 810:

"We think it was an agency contract. It is not a contract in which the consignee can sell at any price, or on any terms he may choose, but as we understand it, it is a contract or consignment of goods to be sold on commission by the consignee, as agent for the consignor, for cash. The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return."

In the case of *In re Columbus Buggy Co.*, C. C. A., Eighth Circuit, 143 Fed., 859, the Court, by Judge Sanborn, said, at p. 860:

"The material terms of this contract were that the goods should be selected from those of the Columbus Company by the Washburn Company and should be shipped and billed to it as agent by the Columbus

Company at the latter's wholesale prices, that the Washburn company might sell the goods at such prices as it saw fit and that it would pay to the Columbus Company the wholesale prices less 5 per cent. discount for the goods it sold in each month by the tenth day of the succeeding month, that it would keep the property insured for the benefit of the Columbus company and would bear all expenses of freight, storage and hauling, that the contract should continue in force one year and that, unless it was renewed, the Washburn company would at its expiration return that portion of the merchandise unsold and the Columbus Company would repay the freight which had been paid upon this portion and that all the goods should be on consignment and the title should remain in the Columbus company and subject to its order until they were sold and paid for in cash. The Columbus Company properly presented to the District Court its claim for that part of the merchandise which the Washburn Company held unsold under this contract and which the trustee had taken at the time of the adjudication, and that court denied its petition upon the ground that the contract evidenced a conditional sale and was therefore voidable under the statute of Oklahoma."

* * * * * * * * *

"An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these characteristics. The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.",

and further, at p. 861:

"A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage and handling and that he will hold the unsold merchandise subject to the order of the furnisher discloses a bailment for

sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price."

In *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, C. C. A., Eighth Circuit, 156 Fed. 1, a manufacturing corporation of New Jersey made annual contracts with a corporation of Colorado engaged in the wholesale business in that state, whereby the former agreed to send from its mill and warehouse in Eastern states to the latter in Colorado, upon its orders, rubber boots, shoes, and other rubber goods during the year for sale, and the latter agreed to receive, to store, and to sell them in its name as consignee, and to pay to the former for the goods which the latter sold certain agreed prices, which were so much less than its selling prices to its customers that it secured thereby the expenses of carrying on the business and a liberal commission. The contracts provided that the latter was appointed the agent of the former to sell the goods, that the latter should make advances when requested, that to the amount of its profits it guaranteed the sales, that the goods and their proceeds, until the latter paid the agreed prices, should be the property of the former, and that the latter assumed the risk of the receiving, storing, handling and selling. The manufacturing corporation shipped the goods as agreed. It had no office, warehouse, or place of business in Colorado, and it neither incurred nor paid any of the expenses of

receiving, storing and selling the goods. The Colorado corporation ordered, received, stored, and sold the merchandise at its own expense, in consideration of the factorage secured to it by the contracts.

It was held that the agreements were factorage contracts. The Court said, at p. 5:

> "The question has been exhaustively argued whether this was a contract for a conditional sale or a contract of agency. It did not evidence a conditional sale, because there was no obligation of the rubber company to transfer the title to the shoe company for an agreed price, and no obligation of the shoe company to pay an agreed price for the goods. There was no vendor or vendee named in the agreement. It was a contract of bailment for sale, not a contract of sale."

The contract under consideration in *In re Pierce*, C. C. A., Eighth Circuit, 157 Fed. 757, provided "(a) The bankrupt should receive all implements shipped and pay the freight charges thereon, and (b) store and insure them at their full value, be liable for damages thereto and keep the company harmless from all charges. (c) in case the bankrupt failed to sell all the implements received, he should either purchase and pay for those unsold at prices fixed, or hold them subject to the order of the company for a specified period, or reship or redeliver them to the company free of freight and charges. The bankrupt, not the company, had the choice of these alternatives. (d) The bankrupt agreed to sell upon terms specified, and not to deliver to purchasers before they fully settled by cash or note and to be responsible to the company for the regular price of any put out without settlement. (e) The bankrupt agreed to remit the company all cash received on sales, less commission, and to make settlement for all implements ordered under the contract upon the close of the selling season or whenever requested by the company. Provisions were made concerning credit to purchasers. (f) The bankrupt was to

guarantee the notes of purchasers. (g) The company was to sell certain of the implements specified to no other party than the bankrupt and the bankrupt was to handle no other make nor to sell outside of designated territory. (h) The implements ordered by the bankrupt were to be sold on commission for the company and should be and remain the property of the company until sold. The proceeds were also to be the property of the company. (i) The company allowed as full commission the amount realized on all sales over and above the prices specified, the commission to be the compensation for transacting the business and fulfilling the conditions imposed. The company reserved the right to rescind the contract if the bankrupt defaulted in any of his obligations", and it was held to be a contract of bailment for sale.

Franklin v. *Stoughton Wagon Co.,* C. C. A., Eighth Circuit, 168 Fed., 857, involved a contract similar to that considered in *John Deere Plow Co.* v. *M'David, supra,* and *In re Columbus Buggy Co., supra,* and provided that the agent should "pay all freight, taxes, expenses and commissions for doing the business. The Court, by Judge Riner said at p. 860:

> "The distinction between conditional sales and contracts of bailment or agency was clearly stated by Judge Sanborn of this Court in *Re Columbus Buggy Co.,* 143 Fed. 859, where the Court had under consideration a contract almost identical with the contract we are now considering.",

and further, at p. 861:

> "The contract before us is not a contract in which the consignee can sell at any price or at any terms he chooses, but contains a plain provision that the goods are at all times subject to the order of the wagon company until they are sold, and we think there is no doubt about the right of the wagon company under the contract to require the goods returned."

See also *Wood Mowing Machine Co.* v. *Van Story,* 171 Fed., 375.

In *Parlett* v. *Blake,* 188 Fed. 200, goods had been shipped to a consignee for sale under a contract which provided that the consignee should pay the expenses of insurance, storage and freight. The contract was to run to July 1, 1909, and the consignee agreed to buy and pay for all goods on hand at that time. When July 1, 1909, came, the goods on hand were sold to the consignee, but it was held that until that time he held them as agent only. The Court said, at p. 202:

> "The contracts in question were primarily contracts of agency for the sale of the consignors' goods for a period ending July 1, 1909. Goods were to be intrusted to the agent by them for sale and any that were actually sold prior to that time were the goods of the principals, and the proceeds less the commission reserved belonged to them and had to be accounted for."

On the proposition that an agreement to buy on the termination of the contract is insufficient to make a consignee a vendee prior to that time, see also *In re Reynolds,* 203 Fed., 162.

In *Childs & Co.* v. *Waterloo Wagon Co.,* 37 App. Div. (N. Y.) 242, the contract was contained in the following letter:

> "I hereby agree to act as agent for you, as such agent to receive all goods that I hereby, or may hereafter, order, and to hold all such goods, and all money and proceeds of the sale of the same, subject to your order, and in trust for you, to sell prior to the time designated by 'terms,' or as agreed, as per orders given, all goods received, and to account to you at such time for all goods so received, either in cash or satisfactory bank notes bearing interest. It being distinctly agreed that the delivery and receipt of note or notes does not, in any way, relieve me from liability as agent acting in trust for you, and to account to you for all goods and proceeds as such agent; nor shall the giving by me of any

> note be construed to give me title to said property until the same shall be fully paid. In part consideration hereof, it shall be obligatory upon me to protect the interest of Charles H. Childs & Co. in the foregoing referred to property from loss or damage by fire, exposure or otherwise. All orders subject to the approval of Charles H. Childs & Co., and when accepted cannot be canceled."

The Appellate Division of the New York Supreme Court held that goods shipped under the contract were consigned for sale and affirmed the judgment appealed from, on the opinion of the Referee, who said, at p. 247:

> "In my view of this case, the goods were consigned by a principal to its agent for sale on commission, the title remaining in the principal until the goods were sold by the agent in the usual course of business. The fact that the agent was to receive as commissions all he could obtain over a certain price at which the goods were consigned to him, instead of a percentage on sales, did not change the transaction to a sale of goods."

In *Lenz* v. *Harrison*, 148 Ill., 598, the intermediate Appellate Court made a formal finding that certain wagons were held as agent, and this was binding on the Supreme Court if really a finding of fact. It was based on a written contract, however, and was therefore reviewed. By the terms of the contract A appointed B his agent to sell wagons, and B agreed to store the wagons, pay the freight, taxes and all expenses, not to sell on credit except to people of undoubted solvency and then to take notes for twelve months or less at 7% on blanks furnished by A; to endorse all notes; to send cash at once on all cash sales; at end of each month send in statement and all notes taken; and if so required by A at the end of twelve months, to give a note for all wagons then remaining on hand, but this not to amount to a positive sale without said requirement. The goods were to be invoiced to B at agreed prices and upon settlement B to retain all excess over the agreed invoice price.

It was held that the clause requiring B to purchase remaining wagons, if standing alone, might indicate a sale, but that on the whole contract, it was really an agency agreement only. The Court said:

> "Indeed we find nothing in the contract, when all its provisions are considered, which can properly be construed in such a manner as to make the transaction a sale."

In *Holleman* v. *Bradley Fertilizer Co.,* 106 Ga. 156 the Court said at pages 158-160:

"The following is the written contract declared upon by plaintiff below in its amended petition, and which was introduced on the trial of the case * *:

> 'This agreement made this 13th day of March, 1888, between Bradley Fertilizer Company of Boston, Mass., and G. T. Holleman & Son of Lamar's Mill, Upson Co., Ga., witnesseth, that said Bradley Fertilizer Company hereby agrees to supply said G. T. Holleman & Son with a limited quantity of fertilizer for sale by them during the season of 1887 and 1888, upon following terms and conditions: The fertilizers to be delivered F. O. B. cars at Butler, Ga., viz: 12 tons Sea Fowl Guano at 26 dollars per ton 2000 lbs., which price is to be net to the Bradley Fertilizer Co., exclusive of all charges and commissions. A complete statement of the season's sales with a list of the purchaser's names in full is to be furnished said Bradley Fertilizer Co. by said G. T. Holleman & Son, not later than May 1, 1888. Settlement is to be made on or before May 1, 1888, for all said fertilizer sold to date of settlement by said G. T. Holleman & Son, by note or notes of said G. T. Holleman & Son maturing not later than November 15, 1888, and payable at Macon, Ga., without any expense whatever of remittance to said Bradley Fertilizer Company. The specific cash, checks, notes, liens, and other obligations received from time to time by said G. T. Holleman & Son in payment for or on account of said goods sold by them are to be so and held in trust for the Bradley Fertilizer

Co. and forwarded to said Company not later than May 1st, 1888, to secure the payment of note or notes of said G. T. Holleman & Son. All checks, notes, liens, and other obligations so received are to be guaranteed by said G. T. Holleman & Son, and, if returned to or left with them for collection, are, with the proceeds, to be at all times the property of the Bradley Fertilizer Company, until the note or notes of said G. T. Holleman & Son are paid in full. Said notes of G. T. Holleman & Son must be met at maturity, and their prompt payment must not depend upon the collections of the notes or accounts of the persons who have purchased said fertilizer. Said fertilizers until sold are the property of the Bradley Fertilizer Co. and any part thereof unsold on May 1st next is to be subject to their order, but the said G. T. Holleman & Son hereby agree to keep them well sheltered and to hold the same free of all charges and storages.' * * *

1. In several of the grounds of the motion for a new trial, error is assigned on the construction of the above contract given by the judge in his charge to the jury. On this point the court charged the jury that the contract meant that Holleman & Son were the agents of the Bradley Fertilizer Company; that the contract constituted Holleman & Son agents of the company to sell a certain specific amount of guano at a certain specified price, and that, under and by virtue of the terms of that contract, title never passed out of the Bradley Fertilizer Company until it was disposed of by their agents to the consumers. Counsel for plaintiffs in error contend that this was an erroneous construction of the contract; that the stipulations entered into between the parties constituted Holleman & Son purchasers of the goods from the company, and that, therefore, when the goods were delivered to them, title passed out of the company and vested in them. We think the court was right in its ruling upon the subject. Manifestly, under the terms of the contract, Holleman & Son were under no obligation to the company, and had incurred no liability, until they had made sale of the goods to third parties; and, until this sale was made, the title to the property remained in the company. If there

were any doubt about what the real intention of the parties was under the terms of the contract down to the last sentence, that sentence clearly removed all ambiguity in stipulating that 'Said fertilizers until sold are the property of the Bradley Fertilizer Company, and any part thereof unsold on May 1st next is to be subject to their order.' ''

In *Milburn Mfg. Co.* v. *Peak,* 89 Texas, 209, the question was whether a certain contract was "one of consignment merely, or one of sale." The court said at p. 210:

"The contract referred to in the above certificate is in substance as follows:

'This agreement between Milburn Mfg. Co., party of first part, and Hood & Co., party of the second part, witnesseth: (1) That first party agrees to manufacture and ship to second party the following described vehicles to be sold and accounted for to first party in cash or purchaser's note, as herein described, at the prices herein stated (here follows detailed description of vehicles and prices). All notes to be on blanks furnished by first party, second party to see that the blanks therein retaining a mortgage on articles sold are properly filled out and that a mortgage is thereby created, and second 'party shall have no authority to take notes not in accordance with this provision'; (2) that second party agrees to receive, store, pay freight, and keep under cover and good condition, and fully insure at their own expense, in the name and for the benefit of first party all vehicles sent, until sold by second party or ordered away by first party as herein provided, to pay all taxes on all vehicles, to make all reasonable efforts to sell same, to settle for all vehicles sold, to make all sales and take all evidence of indebtedness therefor for and in the name of first party, to remit the cash and notes received for said vehicles to first party. All notes so transferred to be endorsed and guaranteed by second party, who agrees to take up and pay cash for all such notes as should not be paid in sixty days after maturity; second party to make no charge against first party for selling, storing or handling

the vehicles, their sole commission and compensation for doing such business to be the margin or difference between the price herein stated and the prices at which said vehicles shall be sold, to be ascertained and received by first party. Second party agrees to sell all the vehicles under this contract within twelve months and in case of failure or neglect to do so 'to settle for those remaining unsold in the following manner, to-wit: At the option of first party to either give their note due in three months with ten per cent interest, payable to first party or order, or to pay cash for them at the end of three months, or to store said vehicles in good order free of charge subject to the order of first party; (3) that the ownership of all vehicles furnished under this contract or their proceeds shall remain in first party until settlements shall have been made for them by second party as herein provided, and that the money and effects received in the course of the business of this agency shall in no case or under any circumstances be appropriated to the use of the second party until such settlement is made and the compensation or commission of second party has been ascertained and set apart by first party; (4) This agreement hereby made revocable at the pleasure of first party, which reserves the right to withdraw any of the above jobs at any time; (5) This contract only applies to above goods now on hand at Fort Worth, Texas.'

The contract is quite voluminous, but we think the above is the substance of its stipulations.

A factor is one to whom goods are sent for sale on commission; the relationship between him and the consignor is that of principal and agent, the general property in the goods remaining in the consignor. If he undertakes to guarantee the payment of the debts arising through his agency, he is said to sell on a *del credere* commission. * * * At all events it is clear that his contract of guaranty is not at all inconsistent with his being a factor. * * *''

And in concluding the opinion, on page 212, the court said:

"We are therefore of opinion that Hood & Co. were merely the factors of appellants and that the instrument should be construed to be a contract of consignment and not one of sale."

In *Monitor Mfg. Co.* v. *Jones,* 96 Wis. 619, the following contract was considered:

"Monitor Manufacturing Co. * * and J. A. North & Sons, * * agree and contract, to-wit: Said company hereby appoints said J. A. North & Sons as its agent or agents for the sale, on commission, of its machines, until all goods shipped under terms of this contract are sold or turned over to Monitor Manufacturing Co., which shall be done on the latter's order.

Said J. A. North & Sons accept the agency, and agree to the conditions of this contract. Said agent or agents are to solicit for orders thoroughly in the following described territory, and in such territory only:

Fox Lake and vicinity.

Monitor Manufacturing Co. agree to furnish said agency with machines as follows, and as ordered up to October 1st, 1895, the commission to consist of amount received above the following net prices. * *

Said agent or agents desire goods ordered above to be shipped on or about Feb. 1st, 1895, *on terms, one-half six months, balance eighteen months, in farmers' notes, with legal rate of interest if paid at maturity; if not so paid, interest at highest legal contract rate from April 1, next, on spring sales, and Sept. 1, next, on fall sales. Final and complete settlement for all spring sales shall be made on or before May 1, next, and for all fall sales on or before Oct. 1, next. For notes maturing first fall, or in six months, in excess of same amount due second fall, or eighteen months, acceptable to Monitor Manufacturing Co. in settlement, a discount of five per cent. will be allowed. Cash discount ten per cent. up to July 1, 1895.*

All machines and their proceeds shall remain the property of the Monitor Manufacturing Co. until so settled and paid for.

Retail prices to be governed by Monitor Manufacturing Co.'s printed blank orders. On each sale one of said orders to be filled out with a true property statement, and times of payment.

Sales to be made to good and responsible parties only. All notes to be drawn to the order of Monitor Manufacturing Co. Said agent or agents agree to render at time of settlement, to Monitor Manufacturing Co., a true statement of all sales, and to have on hand the entire proceeds of each and every sale, and to deliver to Monitor Manufacturing Co. or its authorized agent, such complete proceeds, from which said company shall pay said agent or agents the commission due on sales, such payment to be pro rata in cash or notes in proportion of the commission to the net prices above given. Sales made by trade, other property than notes being received, shall be considered same as cash sales. In case notes tendered to Monitor Manufacturing Co. as proceeds of sale, do not each contain a true property statement of at least $1,000. over and above all indebtedness and exemptions, or, in lieu of this statement, are not each secured by first mortgage, duly executed and recorded, on property of $300 market value, said company shall not be bound to accept such notes, but the agent or agents hereby agree to accept them to apply on his or their commissions. However, be it understood that in no case shall the represented value of notes not complying with the conditions of this contract exceed agent's commission.

On any sale or sales made by said agent or agents under this contract that prove a partial or total loss by reason of the uncollectibility of notes, said agent or agents agree to pay to Monitor Manufacturing Co. fifty per cent. of the loss on such notes, payment to be made either in cash or notes acceptable to Monitor Manufacturing Co., whenever said company transfer to the agent or agents the claim or claims on which settlement by virtue of this agreement is demanded.

Said agent or agents agree to receive and pay freight on all machines shipped, taxes, insurance, and all damages sustained to the machines by their

not being properly housed, on all machines carried that he or they may have ordered. If Monitor Manufacturing Co. relieve said agent or agents of any machines, said agent or agents agree to put machines aboard cars free of charge and will also pay at settlement as much as the difference between place of reshipment to the point shipped, so as to make it equal to freight from factory.

Said agent or agents to sell the machines subject to the regular warranty furnished, and not to engage in the sale of other machines of the same kind during the term of this contract. Monitor Manufacturing Co. agree to use its best efforts to ship all machines ordered, but shall not be held responsible to said agent or agents in case the demand exceed the supply.

At the request of Monitor Manufacturing Co. complete returns of all machines delivered on this contract shall IMMEDIATELY be sent to said Company.

A commission of twenty per cent. allowed on the sale of repairs, excepting rubber grain-drill tubes, which are furnished on net cash terms. All repairs to be settled for in cash.

All 12 Bar P. F. seeders sold net cash July 1, 1895, $31.00 each.

Freight equal to Beaver Dam.

Notes in our favor turned over to agents as commission must be sent to our office for indorsement. Our road representatives have no authority to indorse notes in our name.

The court said at pages 623-624:

"The defendant's contention is that the contracts under which the implements were placed in the hands of North & Sons were in fact contracts of conditional sale of the machines, and hence void as to all persons save the parties and those having actual notice thereof, because they were never filed in the office of the town or village clerk, as required by sec. 2317, R. S. This is the only substantial contention made, and, if it fails, the judgment must be affirmed.

Careful perusal of the contracts convinces us that they were commission contracts in legal effect, and not contracts of conditional sale. The contracts are

quite similar in their terms to the contract which was under consideration in Williams M. & R. Co. *v.* Raynor, 38 Wis. 119, and which was held to be an agency or commission contract; and much that is there said applies with equal force to this case. The controlling question undoubtedly is whether the contract provides for consignments of goods to be settled for at fixed prices out of the proceeds of the goods when sold, or whether, under the terms of the contract, the alleged consignee is in fact a purchaser, and becomes liable for the goods, when sold, as a principal debtor; and these questions are to be determined not so much by the words used as by the evident intent and legal effect of the provisions. Scrutinizing the various provisions as carefully as possible, we conclude that the contract before us calls for consignments of goods to be settled for out of the proceeds of sales, and does not make the consignees purchasers of the goods."

Weir Plow Company v. *Porter,* 82 Mo., 23, involved the construction of a contract, which the court summarized as follows:

"That the Weir Plow Company agrees to manufacture and furnish to the party of the second part, aboard the cars at Monmouth, Ill., on or before the 20th day of February, 1876, twenty-four wood beam cultivators, etc. Party of the first part further agrees to sell the above named implements to no other than the party of the second part, during the year 1876, in the following territory, viz: Putnam county, Missouri. The party of the first part further agrees to pay the party of the second part $6.40 for selling each wood or iron beam cultivator, etc. Provided, each implement is sold at respective list prices before mentioned. All notes taken for the sale of the above implements to be made payable to Weir Plow Company, or order, bearing interest, from June 1st, 1876, or from date, at the rate of ten per cent. * * * And provided further, that the party of the second part take no notes without their being signed by a resident land owner, or good and sufficient security, and guarantee their payment by

indorsing them, waiving demand, notice of protest and non-payment. * * * Said party of the second part agrees to sell the aforesaid number of implements as above stipulated, to keep all moneys and notes separate and apart from individual or company business, and to remit cash due each month for each implement sold for cash, to Weir Plow Company, at Monmouth, Illinois, and be ready to settle with the party of the first part by the 1st of July next, or at any time thereafter, when the party of the first part or their authorized agent may call upon the said party of the second part.

* * * The said party of the second part (Harper) agrees to represent each implement sold for cash, by the cash, at wholesale price, and each implement sold for note by note, at retail price, and indorsed as above stipulated, such notes as the party of the first part may designate sufficient in amount to pay for all implements not paid for cash, counting $22.75 for each wood beam cultivator, etc. The said party of the second part further agrees that should he neglect or fail to sell all of said implements by the 1st day of July, 1876, to settle for those remaining on hand by giving his note, payable to the Weir Plow Company, or order, due November 1st, 1876, or indorse and turn over farmers' notes as provided for payment of implements sold on time, as the party of the first part may elect; said notes to bear interest at ten per cent from maturity, or, if the party of the first part should so elect, to store and keep well housed, free of charge, implements unsold, subject to the order of the party of the first part.

The party of the first part reserves the right to revoke this agency and take possession of said implements and the proceeds of those sold, at any time the said party of the second part fails to discharge his duties as agent."

In holding this to be a contract of bailment only, the Court said at pages 29-30:

"It is true that the plaintiff, according to the terms of the instrument, agreed to manufacture and furnish to Mr. Harper the implements covered by it, and not to sell them to any one else in Putnam

county. This language of itself could not constitute a sale to Harper, in the absence of appropriate subsequent provisions to that effect. Now it happens, that all the subsequent provisions negative the inference of a sale to Harper, and constitute him a bailee or agent for the purpose of selling the implements to others, and accounting for the proceeds upon a commission at a fixed sum for every implement sold by him. * * * The whole bailment or agency is subject to revocation upon failure of said Harper to discharge his duties as agent. I am unable to perceive how Mr. Harper, or his partner, can claim any right of property in the implements as against the company, under this contract and the evidence in the record. According to the obvious intent of the contract, the unsold implements did not vest in Harper and his partner unless the company should choose to make them vendees upon their offering their paper for the price thereof, and should not choose to order the implements on storage for the future disposition of the company.

Under the evidence the agents did not furnish their notes for the unsold implements, nor were they, or anything equivalent thereto, accepted by the company in consideration for a sale of them. On the contrary the property unsold was retained on storage for the company; and the assignee of the agents neither had or made any claim for it, as passing to him under a general assignment, which could legally pass nothing belonging to the company. There was not even a conditional sale of the unsold implements, because there was no condition within the possible power of Harper to perform which would give him the title. Any title to be acquired by him depended upon the election of the vendor whether it would make him a vendee, by accepting his paper for the purchase money, or decline doing this and order the goods to be retained on storage for the use of the company."

In *National Cordage Company* v. *Sims*, 44 Neb. 148, the court said at page 153:

"The law implies a mere consignment of goods for sale upon a *del credere* commission, and not a sale

thereof where the contract provides that the consignee shall receive them and return periodically to the consignor the proceeds of sales at prices charged by the latter, the consignee guarantying payment therefor."

In *The Williams Mower & Reaper Co.* v. *Raynor*, 38 Wis. 119, the following contract was considered:

"ARTICLES OF AGREEMENT for the season of 1874, entered into this 31st day of January, 1874, by and between the WILLIAMS MOWER & REAPER COMPANY, of the city of Syracuse, state of New York, as the first party, and W. C. RAYNOR, of the city of Milwaukee, state of Wisconsin, as the second party—WITNESSETH:

1st. The second party hereby agrees to act as agent of the first party, for the sale of 'The Williams Changeable Speed Combined Selfraking Reaper and Mower', 'The Williams Dropper', and 'The Williams Single Mower,' in the following territory: * * * and to guaranty the sale for the harvest of 1874, in the territory named above, of at least thirty-six of said Combined Selfrakers No. 1, and forty-eight of the No. 2,—of said Droppers No. 1,—Nos. 2 and 5; three Droppers and five of said Single Mowers to be hereafter shipped him by the first party, as per his shipping directions.

2d. Also to thoroughly canvass said territory, and order from time to time such further number of machines as he shall find sales for, guarantying the sale of all machines so ordered; the first party to fill the orders so far as their supply will allow; and any of the machines so ordered remaining on hand unsold at the close of the harvest, to be settled for by note of the second party, due December 1, 1875, or a continuation of this contract until the same are disposed of and paid for, at the option of the first party—in either case to draw interest at ten per cent. per annum from July 1, 1874, instead of farmers' notes, as hereinafter provided.

3d. The second party agrees to keep properly stored under cover all machines in his care, and pay all freight and charges on the same.

4th. The second party agrees to give special assistance either in person or by competent agent, to each purchaser, to set up and start the machine, and will not deliver a machine until fully settled for.

5th. The second party guaranties that all the Combined Selfrakers shall net as follows: No. 1, one hundred and seventy dollars; No. 2, one hundred and fifty five dollars; Droppers No. 1, one hundred and fifty dollars; No. 2, one hundred and thirty-five dollars each, to the first party at their works in Syracuse, New York, in creditable farmers' notes, taken for said machines, to be due and payable at least one-half on or before December 1, 1874, and not exceeding one-half December 1, 1875, with interest at ten per cent. per annum, from July 1, 1874, and the Single Mowers eighty-five dollars each, to the first party at their works in Syracuse, New York, in creditable farmers' notes and pro rata cash, taken for said machines, to be due and payable on or before December 1, 1874, with interest at ten per cent. per annum from July 1, 1874; and on all machines sold and paid for in cash on or before October 1, 1874, and promptly remitted for as received, the first party is to allow a discount of ten dollars on each Selfraker or Dropper, and five dollars on each Single Mower so sold and remitted for. In every sale where notes are taken, the blank forms furnished by the first party to be used, payable to their order, fully filled out, and to guaranty the collection of each of said notes.

6th. The second party agrees to collect notes when returned to him for that purpose, and to obtain security for the same, if required by the first party, at his own expense.

8th. The second party agrees to receive and pay freight on all extra parts ordered by him, to keep them under cover, to sell the same for cash only, and is to be paid by the first party out of the proceeds of extra parts sold and paid for, 35 per cent.

9th. The second party agrees to keep a true and accurate account of all transactions pertaining to the business of the first party; will in no case allow the same to be mixed up with his other business; and will at any time and all times when required by first party, exhibit said accounts for inspection.

10th. The first party warrant their machines to be well made, of good material and well finished, to mow, reap and deliver the grain as well as any machine made for the same purpose.

11th. The second party agrees to render a full statement on blank forms furnished by first party, of all sales of machines and extra parts, on or before the first day of October, 1874, with full payment of any balance that may remain due to the first party, in proportion of cash and notes therein agreed. * * *

It is understood if this contract is carried out fully and faithfully on the part of W. C. Raynor, a reduction of five dollars is to be made upon each machine at the time of settlement.

For exceptional cases, when necessary to make a sale, seven per cent. interest will be allowed, instead of ten, as named in the contract. * * *''

The court held that the contract created an agency for sale only, and said at pages 128-131:

"After very careful consideration of all the provisions of the contract under consideration, we have reached the conclusion that the defendant was the agent or factor of the plaintiff to sell the machines, and that the title thereto did not vest in the defendant. In other words, we conclude that the defendant held the machines, and the proceeds of the sales thereof, in a fiduciary capacity; and, the motion papers showing that he had converted or fraudulently misapplied the same, the order of arrest was properly made. * * *

We are unable to construe a contract containing the above provisions, to be a contract of sale. It does not profess to be a contract of sale; on the contrary, by its express terms, the defendant agrees to act as agent of the plaintiff for the sale of the machines within certain specified territory. The restriction of the defendant as to the length of credit he might give, and, what is perhaps more significant, the provisions that the proceeds of sales, to the extent of the stipulated prices, whether cash or notes, should be paid and delivered over to the plaintiff and that each purchaser on credit should be required to give his note payable to the order of the plaintiff,

and to covenant that the title to the machine so purchased should *remain* in the plaintiff until paid for, all strongly, almost unmistakably, indicate that an agency or bailment to sell, and not a sale, was intended by the parties. To the same effect is the provision by which the defendant guarantied the sale of all machines ordered by him. If he was the absolute purchaser and owner of all machines delivered to him under the contract, the reason for inserting this provision is not apparent.

The construction we give to this contract is strengthened by the provisions in the second paragraph relating to machines not sold during the season of 1874. At its option the plaintiff could have required the defendant to give his note for the stipulated price of the unsold machines, or could have allower them to lie over in his hands until the next season, subject to the same contract. This, we think, was an option to compel the defendant to purchase such machines absolutely, or to retain them as an agent or bailee to sell. The provision seems inconsistent with the theory that the title thereto passed to the defendant in the first instance. * * * *.

It is also claimed that the provision which requires the defendant to guaranty the collection of all notes taken for machines, is an indication that a sale, and not a bailment, was intended by the parties. But this is merely what is known as a *del credere* agreement, quite usual between principals and factors, and which in no manner affects the title of the property to which it relates, or the fiduciary relation of the factor to his principal. * * * we think * * that it is a contract by which the defendant agreed to act as agent in certain counties, and under certain restrictions, to sell machines for the plaintiff, and to pay over to the plaintiff the money and notes received by him on such sales, to the stipulated amount, the plaintiff remaining the owner of the property until sold by the defendant. * * * *''

See also:

Sturtevant Co. v. *Dugan & Co.,* 106 Md., 587;
Balderston v. *Natl. Rubber Co.,* 18 R. I., 338;

Nutter v. *Wheeler,* 2 Lowell, 346 and 18 Fed. Cas., p. 497;
National Bank of Augusta v. *Goodyear,* 90 Ga., 711;
Eldridge v. *Benson and Trustees,* 61 Mass., 483;
Cortland Wagon Co. v. *Sharvy,* 52 Minn., 216;
Donnelly v. *Mitchell,* 119 Iowa, 432;
Lance v. *Butler,* 135 N. C., 419;
Norton & Co. v. *Melick,* 97 Iowa, 564;
Harris v. *Coe,* 71 Conn., 157;
Fleet v. *Hertz,* 201 Ill., 594;
Furst v. *Commercial Bank,* 117 Ga., 472;
Blood v. *Palmer,* 11 Me., 414;
Snook v. *Davis,* 6 Mich., 155;
St. Paul Harvester Co. v. *Nicolin,* 36 Minn., 232.

In *Sturm* v. *Boker,* 150 U. S., 312, a contract was considered, under which goods were consigned to be sold by the consignee "to the best advantage," the profits to be equally divided and the goods to be shipped "free of any expense" to the consignor and if not sold, returned "free of all charges." The goods consigned were insured by the consignee. The Court, by Mr. Justice Jackson, said at p. 326:

> "It is too clear for discussion or the citation of authorities, that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consigned' employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other.",

and further, at pp. 328 and 329:

> "Was the contract, as claimed by counsel for the defendants, a contract of 'sale or return?' We

think not. The class of contracts, known as contracts of 'sale or return,' exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchaser to retain or return. In this class of cases the title passes to the purchaser subject to his option to return the property within a time specified, or a reasonable time, and if, before the expiration of such time, or the exercise of the option given, the property is destroyed, even by inevitable accident, the buyer is responsible for the price.

"The true distinction is pointed out by Wells, J., in *Hunt* v. *Wyman,* 100 Mass., 198, 200, as follows: 'An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.' "

* * *

"The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale. This distinction or test of a bailment is recognized by this court in the case of *Powder Co.* v. *Burkhardt,* 97 U. S., 110, 116.

The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title."

* * *

"The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, express or fairly implied, and

> render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking,''

In *Ludvigh* v. *American Woolen Co.,* 231 U. S., 522, a contract under which the Woolen Company consigned goods to the so-called Niagara Company was considered. It provided that the Niagara Company should hold and care for the goods shipped to it, sell them for the Woolen Company, and remit to that Company the amount collected, ''minus, however, the difference between the price'' for which it had been invoiced to the Niagara Company and the price at which it had been sold by it. The property was to be insured by the Niagara Company for the benefit of the Woolen Company. The contract further provided that the Niagara Company ''does hereby guarantee the payment of all bills and accounts for merchandise, possession of which is delivered to it under this agreement'', and if the bills were not paid the Niagara Company agreed ''to pay . . . the invoice price of said merchandise'' and acquire the ''title to said merchandise, or to the proceeds thereof''. The last paragraph of the contract provided as follows: ''This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part.'' It was held that the contract was one of bailment for sale. The Court, by Mr. Justice Day, said at p. 528:

> ''The entire contract must be read to ascertain the purpose of the parties, and we find in clause eight, limiting the agreement to one year, the provision that if for any reason the agreement terminated all of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately returned to the Woolen Company. The District Court held that this agreement,

sections four and five, obligated the Niagara Company to pay for each and every piece of goods delivered under the contract with it, but for the reasons we have stated we cannot agree with this construction. We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith. As this court held in *Sturm* v. *Boker,* 150 U. S., 312, 330, an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment where the identical article is to be returned in the same or altered form and title to the property is not changed."

I.—In 1., *Clark & Skyles,* on the Law of Agency, the difference between contracts of sale and agency contracts is well stated, at p. 16, as follows:

"The question is: Did the consignor intend to sell the goods to the consignee, and the consignee intend to buy them himself, or did the parties intend that the consignee should take possession of the goods merely as the agent of the consignor, and sell them on his account?",

and further, commencing at p. 18:

"When the business undertaken by one party, with respect to handling and selling goods. is solely for the interest and benefit of the other, the original owner, as where it is agreed that one party shall buy and ship goods for the sole account of another, the relation is clearly that of principal and agent. Among other features which have been held to be repugnant to the idea of an absolute sale, and to show the existence of the relation of principal and agent, are, the retention of the title and the right to possession of the goods by the consignor or original possessor; the reservation by the consignor of the right to have the goods which may remain unsold returned to him, or a reservation by the consignee of the corresponding right to return the goods remaining unsold, or to purchase them outright; stipulations or provisions for the payment by the consignor to the consignee of

percentages and commissions on sales made, which are of such a character as to negative the idea that such sales were made for the direct benefit of the consignee; requirements that the goods shall be sold at prices fixed by the consignor, and that settlements shall be made on that basis; provisions that payment for the goods sold shall be guaranteed by the consignee; provisions limiting the time within which the goods shall be sold, or the credit which shall be extended to purchasers, or prescribing the mode of payment, whether in cash, or by evidences of debt, requiring the making of contracts or the taking of notes in the name of the consignor; requirements that the consignee shall keep the goods safely or keep them covered by insurance; or any other stipulations or conditions which the consignee is bound to observe, and which indicate that the consignor did not intend to transfer the property in the goods to the consignee or relinquish control of them.

It is perhaps unusual, but it is not incompatible with the notion of an agency, that the compensation of an agent to sell goods shall be the difference between the amount of purchase money received by him for goods sold and the price fixed by the principal, or that he shall have for his services all money received by him in excess of the invoice price. He may as well be compensated in this way as by the allowance of a commission upon the gross proceeds.

The breach of a contract to sell goods, and account for the same within a specified time and at fixed prices, will not convert a contract of bailment and agency into a contract of sale."

The Referee's Opinion.

In his certificate to the District Court (pp. 45 to 47) the Referee, after setting forth the proceedings, expressed his opinion of the agreement, and referring first to the point that the Andrus Company kept the Appellant's lamps "separate and apart from the other goods in the house," said: "It does not appear that there was any greater degree of separation" between them and other stock "than would naturally be the case with

any other special line of goods'' (p. 45). It was, of course, quite sufficient if the lamps were kept in such a way that they could be identified and taken at any time, and it is expressly agreed in the stipulation that ''they were kept together on shelves in one place for sale, and in boxes'' specially marked for identification (p. 34). What possible further separation the Referee may have had in mind does not appear.

The Referee then said at page 45: ''The said contract purports to be one of agency and while it provides for the return of any unsold stock at any termination of the contract, whether it terminates by its own terms or from some act of the parties, yet it seems to me that its evident purpose was to enable the manufacturer to control the output of his mills and the disposition of his products, and that when his goods are put in the hands of his so-called agents for sale, that the sale is absolute so far as creditors are concerned, and that upon the termination of an agency as between the agent and the manufacturer, he could require the return of the unsold goods in accordance with his scheme of protecting and controlling his sales. The effect of this contract is to give the agent 60 days' credit, and ten days' further time in which to report sale of the goods actually disposed of, but there is nothing in the contract to prevent the said agent paying for all of the goods upon their receipt, but at the expiration of the 60 days plus 10 days the payment would constitute a sale of the goods and pass the title from the manufacturer.''

This is a direct contradiction of the express terms of the agreement and is difficult to understand. It is certainly clear that the failure to provide that the agent shall *not* buy is no evidence that he has agreed to buy or has a right to buy. The Referee says that goods delivered to the agent are sold, so far as creditors are concerned, yet there is no obligation upon anyone to pay for them until they have been actually sold by the agent to third parties. When the goods reach the agent's

hands his duty is to take care of them, to sell them if he can, and in the meantime to hold them subject to the orders of the owner. His guarantee of sales, which makes him a *del credere* factor, is enforceable only when sales have been made, and it is the only promise to pay that the agent has made.

The Referee further said that the knowledge of Ackroyd (the person who acted for the General Electric Company in delivering lamps) of the fact that the Andrus Company was in financial difficulties was sufficient to apprise the General Electric Company "of the inability of the bankrupt to meet its obligations," and then noted that it "took no steps to terminate the contract" (p. 46). The significance of this as indicating that the General Electric Company retained title has been considered under B., *supra.*

In concluding his opinion the Referee said, at page 47: "I think this case is similar to the case, *In re Graves & Labelle,* No. 5030, decided by the Honorable Edward E. Cushman about June 27, 1913", and then said further that he "therefore sustained" the position of the trustee. This was on October 18, 1913, and in the following month, on November 25, 1913, the decision to which he referred was reversed by this Court (*Berry Bros.* v. *Snowdon* and *In re Graves,* 209 Fed., 336). In that case certain goods had been consigned for sale, under a contract somewhat similar to the contract involved in the case at bar, and the consignee subsequently became bankrupt. The consignor filed a petition against the trustee in bankruptcy, which was denied by the District Court upon the ground that the contract contemplated a conditional sale and was not recorded under the Washington statute. The decision was reversed by this Court upon the ground that the transaction "was not a sale of any kind" but was "clearly one of bailment." The principle involved in this decision governs the case at bar and requires that the order appealed from be reversed. It is true that in that case the consignor paid the "freight,

cartage, storage and insurance and that in the case at bar such expenses were paid by the consignee. That difference, however, is immaterial, as such an undertaking on the part of a factor is a perfectly lawful agreement which can be and is constantly made without in any way changing the relation of the parties, as clearly appears from the authorities already considered.

The conclusion reached by the Referee is not sustained by his reasoning and the authority upon which he relied no longer exists. The District Judge wrote no opinion.

POINT V.

The order appealed from should be reversed, with costs to the appellant.

Respectfully submitted,

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